

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE REX HAVER and MELODY HAVER,
and DONATO SENA and MARIA SENA,

Petitioners.

Misc. Case No. _____

VERIFIED EXPEDITED PETITION TO PERPETUATE TESTIMONY

Petitioners, Rex Haver and his wife/caregiver Melody Haver, and Donato Sena and his wife Maria Sena, submit this verified petition to the Court for permission to take a deposition by written, oral, and/or videotape examination in order to perpetuate their testimony as authorized by Federal Rule of Civil Procedure 27 for use in an anticipated administrative claims to FEMA under the Hermit's Peak/Calf Canyon (HP/CC) Fire Assistance Act and possible future lawsuit(s).

I. Introduction

Each Petitioner's property was damaged and/or destroyed by the HP/CC Wildfire that burned from April through August of 2022. Each Petitioner intends to submit an administrative claim to FEMA under the HP/CC Fire Assistance Act, or which could result in lawsuit(s) for damages against the United States under the Federal Tort Claims Act.

Each Petitioner has unique personal knowledge relevant to each Petitioner's damages from the HP/CC fire:

Rex Haver is a 74-year-old Vietnam veteran who as of April 2023 is on hospice care through the Veterans Administration. His wife, Melody, is also his caregiver. He was "blown to hell" (as he relates) in Hong Kil Dong, Vietnam, in 1967. In the HP/CC Fire the Havers lost everything – their modest double wide trailer and all contents, and their acreage of about 1.5 acres was burned to the ground. Mr. and Mrs. Haver were left homeless. The land had been in their family for 47 years. They had built a second story addition on their 60x12 mobile home with an upper and lower bedroom. They

had a woodshed, well/well house, three freezers, and a back porch on the second story. They had a 2-story, 3.5 car garage with porch, 5 motorcycles. The fire also burned 6 vehicles, Craftsman tools, pool table, ping pong table, greenhouse, septic tank, trees, and sheds. Their retirement was destroyed by the United States.

Donato Sena is 73 years old and has had cancer three times – twice in his larynx (resulting in larynx removal) and also prostate cancer. He has had multiple radiation treatments. Most recently, he was diagnosed with a mass in his colon to be surgically removed on 4/28/23 that is cancerous, with an MRI and CT scan scheduled for 4/19/23 prior to that surgery. He and his wife Maria lost their home completely in the Fire – a double wide mobile home and adobe addition, and about 1.6 acres of property. They have purchased a new double wide mobile home but have been told they cannot put it in place on their property as it is too dangerous to do so with the existing debris from the adobe addition.

These Petitioners may not be able to provide firsthand accounts to support their administrative claims to FEMA under the HP/CC Fire Assistance Act, and possibly file suit, if they must wait for that to occur in due course. These Petitioners seek an immediate Perpetuation Deposition to properly preserve each Petitioner's firsthand account of damages and losses from the Fire. Petitioners respectfully request that this Court issue an order for the perpetuation of each Petitioner's testimony via an immediate deposition in anticipation of claim or litigation under Federal Rule of Civil Procedure 27.

II. Petitioners expect to be claimants and possible parties to action(s) cognizable in a United States District Court.

Petitioners intend to submit an administrative claim to FEMA under the HP/CC Fire Assistance Act, and possibly bring tort action(s) for damages to their properties in San Miguel and/or Mora Counties, New Mexico. Each Petitioner intends to submit a **Notice of Loss** to FEMA by the deadline of November 14, 2024. If each Petitioner's subsequent claim (**Proof of Loss**) is unsuccessful, each may file an action in the United States District Court for the District of New Mexico under the Federal Tort

Claims Act. 28 U.S.C. § 1402(b) and/or the HP/CC Fire Assistance Act.

III. Petitioners cannot presently bring a lawsuit or cause it to be brought.

Petitioners may bring action(s) against the United States or an administrative agency of the United States under the Federal Tort Claims Act and and/or the HP/CC Fire Assistance Act only u[on exhaustion of their administrative remedies. A federal court complaint will be dismissed for lack of subject matter jurisdiction if a claimant has failed to exhaust administrative remedies. *McNeil v. United States*, 508 U.S. 106, 112 (1993). Each Petitioner’s administrative **Notice of Loss** will be filed with FEMA by the deadline of November 14, 2024.

Unfortunately, each Petitioner may not live long enough to complete the Notice of Loss and Proof of Loss claims process under the HPCC Fire Assistance Act. Each Petitioner’s health condition [medical/elderly/end of life] generates an exigent circumstance because each could be deceased or otherwise unable to testify before administrative remedies have been exhausted under the HP/CC Fire Assistance Act. Because each Petitioner may succumb to illness/death before administrative remedies can be exhausted, each Petitioner respectfully requests that this Court issue an Order for perpetuation of each Petitioner’s testimony by deposition in anticipation of a claim or possible litigation under Fed. R. Civ. P. 27.

IV. Subject matter of the expected action.

On April 6, 2022, the U.S. Forest Service initiated the Las Dispensas-Gallinas prescribed burn on Federal land in the Santa Fe National Forest in San Miguel County, New Mexico. That same day the prescribed burn, which became known as the “Hermit’s Peak Fire,” exceeded the containment capabilities of the U.S. Forest Service and was declared a wildfire, spreading to other Federal and non-Federal lands. On April 19, 2022, the Calf Canyon fire, also in San Miguel County, New Mexico, began burning on Federal land and was later identified as the result of a pile burn in January 2022 that

remained dormant under the surface before reemerging. The Hermit's Peak and Calf Canyon Fires merged on April 27, 2022, and both fires were reported as the Hermit's Peak Fire or the Hermit's Peak/Calf Canyon Fire. By May 2, 2022, the fire had grown, causing evacuations in multiple villages and communities in San Miguel County and Mora County, including the San Miguel County jail, the State's psychiatric hospital, the United World College, and New Mexico Highlands University. At the request of New Mexico Governor Lujan Grisham, President Biden issued a major disaster declaration on May 4, 2022. The Hermit's Peak/Calf Canyon Fire was not 100% contained until August 21, 2022.

The HP/CC Fire is the actual and proximate cause of the damages alleged by Petitioners and this Court has ultimate jurisdiction under the HPCC Assistance Act.

V. Each Petitioner's interest in a possible federal lawsuit.

Petitioners lost their family home/outbuildings/personal property/real property and sustained significant damage to their land as a direct result of the HP/CC Fire. If the **Notice of Loss, Proof of Loss**, and ensuing administrative remedies under the HP/CC Fire Assistance Act are insufficient, each may file a federal lawsuit for damages caused by the HP/CC Fire. Petitioners and their heirs have direct and material interests in the possible action(s).

VI. Facts that Petitioners desire to establish by the proposed testimony.

Each Petitioner will testify to what happened when each learned of the fire, what actions each took, and what has happened subsequently to their real and personal property as a result of the HP/CC Fire and its aftermath (including subsequent flooding). Each Petitioner will testify to the damages and the value of the real and personal property that was damaged or destroyed. As sole or co-owners of the subject property, Petitioners are in the best position to do so. In order for Petitioners to recover full damages for their losses, they must personally testify. The absence of their testimony could result in a failure or delay of justice.

VII. Reasons to perpetuate these facts.

Each Petitioner has unique personal knowledge that is material to the claim, which may be irreplaceably lost in the event of their death prior to completing the administrative process with FEMA and possibly commencing a lawsuit in this Court.

VIII. Names and addresses of persons the Petitioner expects to be adverse parties.

FEMA Claims Office Deputy Director Jennifer Carbajal
FEMA Claims Office Advocate Paula Gutierrez
FEMA Hermit's Peak/Calf Canyon Claims Office
P.O. Box 1329
Santa Fe, NM 87504
fema-hermits-peak@fema.dhs.gov

IX. Name, address, and expected substance of the testimony of each deponent.

Mr. and Mrs. Rex Haver
c/o B&D Law Offices, P.C.
P.O. Box 30684
Albuquerque, NM 87190

Mr. and Mrs. Donato Sena
c/o B&D Law Offices, P.C.
P.O. Box 30684
Albuquerque, NM 87190

Each Petitioner/Deponent expects to provide personal knowledge material to the administrative claim to FEMA, and possible subsequent federal lawsuit, that may be lost and/or irreplaceable in the event of their death prior to completing the administrative process with FEMA and possibly commencing lawsuit(s).

X. Conclusion.

For the above stated reasons, Petitioners ask the Court to set this petition for hearing and, after the hearing, order the written, oral, and/or videotaped deposition of each Petitioner to proceed **without delay**.

Respectfully submitted,
B&D LAW OFFICES, P.C.

/s/ Mark C. Dow

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Santa Monica, CA 90401

(800) 691-2363

Attorneys for Petitioners

I HEREBY CERTIFY that on April 20, 2023, a true and accurate copy of the foregoing was served via U.S. Mail to the following:

(served via email and vial U.S. Mail)

FEMA Hermit's Peak/Calf Canyon Claims Office

P.O. Box 1329

Santa Fe, NM 87504

fema-hermits-peak@fema.dhs.gov

FEMA

500 C St. SW

Washington, DC 20024

United States Department of Agriculture

U.S. Forest Service

Region 3, Southwestern Region

333 Broadway SE

Albuquerque, NM 87102

/s/ Mark C. Dow

Mark C. Dow, Esq.

Declaration for Verified Petition


Pursuant to 28 U.S.C. § 1746, I, **Rex Haver**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: 4-20-23


Rex Haver, Petitioner

Pursuant to 28 U.S.C. § 1746, I, **Melody Haver**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: 4-20-23


Melody Haver, Petitioner

Pursuant to 28 U.S.C. § 1746, I, **Donato Sena**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: _____

Donato Sena, Petitioner

Pursuant to 28 U.S.C. § 1746, I, **Maria Sena**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: _____

Maria Sena, Petitioner

Declaration for Verified Petition

Pursuant to 28 U.S.C. § 1746, I, **Rex Haver**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: _____ **Rex Haver**, Petitioner

Pursuant to 28 U.S.C. § 1746, I, **Melody Haver**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: _____ **Melody Haver**, Petitioner

Pursuant to 28 U.S.C. § 1746, I, **Donato Sena**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: 4/20/23 
Donato Sena, Petitioner

Pursuant to 28 U.S.C. § 1746, I, **Maria Sena**, declare under penalty of perjury that I am over the age of 18, and the foregoing information contained in this Verified Petition is, to the best of my knowledge, true and correct. If my name is "digitally" signed below, I confirm that my counsel as listed herein has a signed original of this Verified Petition.

Dated: 4/20/23 
Maria Sena, Petitioner